The Supreme Court and the general will

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Some Speculations on the Judicial Role in Tomorrow's Democracy

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> . . . la volonté générale est toujours droite et tend toujours à l'utilité publique: mais il ne s'ensuit pas que les délibérations du peuple aient toujours la même rectitude. On veut toujours son bien, mais on ne le voit pas toujours. . . .
>
> Il y a souvent bien de la différence entre la volonté de tous et la volonté générale; . . .[1]

I

The principal difficulty in government by majority is that the majority is sometimes wrong. Few men will always accept as a criterion of truth "the majority vote of that nation that could lick all others."[2] Instead, with comforting reliance on the power of reason, one postulates rightness, discoverable by taking thought; and deplores the occasional and, one hopes temporary, divergences therefrom by the multitude. The difficulty arises in distinguishing the occasions when the majority is wrong, from those instances in which the minority itself falls into error despite the superior discernment it is apt to sense in its members. Truth is exasperatingly elusive.

A nation devoted to the majoritarian principle but conscious of its proneness to occasional error, and hopeful that the swings of political power may, after a while, correct its mistakes, does well to look for some governmental device to define and correct majority error during the intervals of aberration. The requirement is an institution of unusual intelligence, detached from politics, and so respected that, at least for a while, a majority will follow it against the majority's own current of desires. In the United States

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we have found such an institution in the Supreme Court. We have given it a limited mandate to correct mistakes made by state or national majorities, describing that mandate in conveniently general terms which permit the Court to adapt its judgments to unforeseen needs as they arise – defining its objectives by such phrases as "due process of law," and "freedom of speech or of the press," which express aspirations rather than rules. This duty it performs with some deference to legislative wisdom, often stated in terms of a "presumption of constitutionality."

With a mission described in such inclusive terms, with a duty to choose the good law and reject the bad, but with no convenient way of determining by an objective test which is which, the Court is sure from time to time to arouse substantial resentment. Of course, soon or late, by constitutional amendment or judicial interpretation, the majority will have its way. That law will be a good law which a majority desires with enough persistence. The role of the Supreme Court will, in the long run, be what the people want it to be. It is therefore important to see what the people of the United States from time to time expect of their Court.

This paper attempts only a cursory examination of one small segment of opinion during a limited time. Here I have only sought to refresh my recollection of what certain liberals thought of the Supreme Court's function a generation ago, and to see what has happened to that opinion since that day. And, lest I be thought too naïf in using the term "liberals," I make haste to acknowledge its unsatisfactory character. It means many things to many men; it varies in usage from generation to generation. One can only be confident in a negative – that it has not, in the time of men now in middle life, been generally taken to describe people who believed that government should keep hands off the economic processes of society.[3] There are terms that are obscured rather than clarified by attempts at definition. For the purposes of this discussion only, I take a "liberal" to mean the sort of man who enjoyed the *New Republic* about 1923.

II

At least one human trait is so common as to approach universality. It is a sort of intellectual myopia, tending to limit the view of each observer to that part of a problem directly under his

eyes. So those who have undertaken to appraise the part played by our federal judiciary have sometimes been misled by undue attention to problems of the immediate moment. Thirty years ago, liberal opinion tended to think of the Supreme Court only as an obstacle in the way of desirable social and economic reforms. In those simpler times, critics needed fewer doubts. Earnest young writers knew, then, that the general will expressed itself through freely elected legislatures; and that when the Supreme Court interfered with the work of the legislators, the Supreme Court was almost always wrong.

Some zealous critics knew that it was always wrong. Comments of the practicing politician are apt to be less guarded than those of the scholar, and the elder Senator LaFollette felt no need to mince words when he spoke of the judicial power to find statutes unconstitutional. In 1922 he told the American Federation of Labor:

> From what source, it may be asked, have the Federal judges derived the supreme power which they now so boldly assert? Not only was such power not given to the judiciary in any Constitution, State or Federal, but the records of the Constitutional Convention show that when it was proposed . . . that judges should have a veto upon acts of Congress, it was decisively defeated on four separate occasions, and at no time received the support of more than three States. . . .
>
> There is, therefore, no sanction in the written Constitution of the United States for the power which the courts now assert. They have secured this power only by usurpation. . . .[4]

Academic commentators, somewhat more restrained, still tended to view the Supreme Court with alarm. Francis B. Sayre, then a professor at the Harvard Law School, wrote in the May, 1923, *Survey:*

> If the Fifth and Fourteenth Amendments are to be so interpreted that henceforth legislation is to be declared unconstitutional whenever it is out of accord with the economic and social theories of five members of the Supreme Court, a blow is struck at one of the most fundamental principles of our government. The legislature then becomes not an independent and supreme body framing policies into law; it becomes subordinate to the Supreme Court which becomes virtually a House of Lords, exercising an actual veto power of such laws as fail to accord with the social theories of five of its members.

Writing in the *Harvard Law Review* in 1924, Maurice Finkelstein, an eminent and philosophical member of the New York Bar,

urged that the Supreme Court renounce its jurisdiction of cases challenging social and industrial legislative policy for the same reasons which sometimes move it to forgo jurisdiction in cases where "political controversies" are involved.

> [A] great deal of the so-called unconstitutional social and industrial legislation might have fared better at the hands of the court had it been treated from the point of view of a political question. This would involve the surrender on the part of the court of the prerogative of passing upon the policy of an act as enunciated by the legislature. . . . For, in truth, in cases involving the industrial policy of a state or nation the measure of due process approaches very closely to the measure of political wisdom. The function of determining the political policy of the government belongs to the legislature. . . . No matter in what terms the opinions of jurists have been couched, it is apparent that it is the fear of consequences or the lack of adequate data that has impelled the courts to refrain from entering upon the discussion of the merits of prickly issues. It seems to us that these very considerations should have compelled the refusal by the courts to take jurisdiction of cases raising the question of the constitutionality of social and industrial legislation. It is difficult for the courts, dependent as they are upon counsel for their facts, to have before them the material considerations that have caused state legislatures to pass a limited-hour day for laborers, or a minimum wage law for women and children. The legislative industrial policy of a state or nation can hardly even be stated in classical legal terminology. It would therefore seem the better statesmanship to have included all of these questions in the general category of "political questions". . . .

The most interesting common feature of these and like comments of a generation ago is the concentration of attention on what was described as social and economic legislation; and the feeling that, left to themselves without court interference, legislators would do well for the people. To suggest that this attitude was anywhere near unanimous in the United States would, of course, be a distortion. But it could fairly be said to represent the "liberal" point of view. Mr. Finkelstein seemed untroubled by any possibility that a day might come when the Supreme Court's inaction in controversies which it called "political" would produce liberal protest. He did not foresee the Court's refusal to require a correction of gross inequality of congressional districting in Illinois,[5] or of the comparable "county unit rule" in Georgia.[6] His recognition of the political importance of much industrial and social legislation was fully justified. But he apparently foresaw no possible application of this doctrine of judicial abstention to suits

brought before the federal judiciary seeking to correct state injustice to the Negro – a political issue of some warmth. That "human rights" are not always easy to distinguish from "property rights"; that judicial restraint in cases of the latter sort, but not in the former, would be difficult to achieve – this seemed to cause little worry in the mid-twenties.

American liberal opinion tended to approve of the Congress and to regard assertion of constitutional rights as legalistic and insincere. Witness the reaction to a presidential reminder.

On April 11, 1924, Mr. Coolidge sent a message to the Senate protesting at the manner of the conduct of Committee investigation of a Cabinet officer – the Secretary of the Treasury, Andrew Mellon. The President wrote:

> Under a procedure of this kind, the constitutional guarantees against unwarranted search and seizure break down, the prohibition against what amounts to a Government charge of criminal action without the formal presentment of a Grand Jury is evaded, the rules of evidence which have been adopted for the protection of the innocent are ignored, the department becomes the victim of vague, unformulated and indefinite charges, and instead of a Government of law we have a Government of lawlessness.[7]

With editorial scorn the *New Republic* of April 23rd took the President to task:

> . . . Mr. Coolidge accuses the Senate of lawlessness [in] the evasion by committees of that body of "the prohibition of what amounts to a government charge of criminal action without the formal presentment of a Grand Jury," and the ignoring of "the rules of evidence which have been adopted for the protection of the innocent." . . . It is based on the preposterous assumption that an investigation into the conduct of public officials who are suspected of wrong doing should be conducted under all the limitations of a criminal trial. If the Walsh and Wheeler committees had not acted in the way which the President denounces as lawless, they would never have obtained the information which the government is now using in order to prosecute ex-Secretary Fall or which justified the President in dismissing Harry Daugherty. Mr. Coolidge demands the placing of restrictions on congressional investigations into the conduct of executive officers which would fatally hamper the investigators in obtaining testimony from unwilling witnesses. If Congress yielded to his demands, the record of administrative officials would thereafter be immune from effective inquiry unless the accused official admitted sufficient evidence of crime to warrant an indictment. . . .
>
> The President's final decision to attack the investigators and disparage the practice of investigations is particularly deplorable for one reason. It is always undesirable that select congressional committees should have to

conduct investigations for the purpose of exposing corruption in office rather than for the purpose of seeking methods of improving the administration of the laws. Investigations of this kind would not be necessary, if administrative officials could be trusted to report indications of corruption on the part of their fellow officials; and when they are necessary it is only because a certain number of public employes and private citizens enter into a tacit or overt conspiracy to allow the corruption to continue. When the exposure finally takes place, popular opinion justifiably suspects the existence of such a conspiracy, and its suspicions are bound to increase and to become reckless in so far as any indication exists of a successful plan to suppress the facts and to force the investigators to quit. . . .[8]

Here again there is no evidence of a gift of foresight. That a day might come when investigations by a Senate committee would suggest that a certain number of public employees and private citizens had entered into a different sort of conspiracy; that in such an event constitutional protection of those accused might appear in a different light – none of this seems to have been thought of by the stern and righteous editorialist.

Aesop's frogs disliked their activist stork king, and wished for his inert predecessor. The problem facing a constitutional philosopher in the United States involves a similar alternation in governmental policy. The constitutionalist must construct a theory by which the Supreme Court will keep hands off the other branches of the Federal government, and hands off the States, when aloofness is proper; and yet will act against each at proper times. We must have King Log and King Stork turn and turn about as each role is proper. This is not simple, for opinions on questions of propriety are rarely unanimous.

III

Liberal impatience with the United States Supreme Court in the twenties was mainly based on four of its lines of decision. The most exasperating was the limitation the Court found in the powers of the federal Congress to control the nation's economy. The economic activity of the nation was unitary, making little question of interstate and intrastate. The procession of necessities of life from the sea and the mine and the forest and the farm to the men who used or consumed them went on without much relation to state boundaries. And activity within the borders of one state had

repercussions elsewhere. Extensive factory legislation in New York, in the New England States, and in many others, made it difficult for these to compete in manufacturing with states having a minimum program of social legislation. Yet the Supreme Court, clinging to the undeniable historic fact that the Congress had been entrusted with power to regulate only commerce conducted with foreign nations and among the several states,[9] continued to hold that production of goods was outside the power of the national legislature. Naturally, those who did not wish to be bothered by federal regulation were gratified by this declaration of federal impotence. Conversely, the struggling cause of liberalism called for an expanded power in the national government which could oblige the dissenting minority of states to comply with the ideas of the more progressive majority. But the Supreme Court persisted in the idea that the grant to the Congress of power over commerce between the states meant that power over other commerce was not granted; that the expression of the one excluded the other; and that there must have been some economic activity not entrusted to the national government. Accordingly the Court was vigilant to block evasive devices by the Congress. It found that a congressional attempt to forbid movement of the produce of child labor from state to state was an indirect effort to control conditions of production in factories, and accordingly was beyond the power of the federal Congress.[10] When the Congress then retaliated by imposing a prohibitive tax on the manufacturer who utilized child labor, the Supreme Court saw through this device as well, and struck it down.[11]

A second grievance of liberals arose because, even where legislation was clearly within the scope of the powers delegated to the Congress (when it sought to regulate interstate railroads, or to govern the District of Columbia, for example), Congress was still not free to legislate as it saw fit, for the due-process clause of the Fifth Amendment[12] restricted it. Thus regulation of anti-union discrimination by railroads,[13] and minimum wage legislation in the District of Columbia hospitals[14] were both held invalid, for, said the Court, these statutes deprived those affected of their liberty and property without due process of law.

A third complaint against the Supreme Court was aroused by its restriction of state legislation. Not content with declaring the

Congress to be without power to correct local economic injustice, The Supreme Court had used the clause of the Fourteenth Amendment which forbade any state to "deprive any person of life, liberty, or property, without due process of law," to take from the states, as well, a reasonable power to correct economic and social injustice. The "yellow dog" contract is almost forgotten now; but forty years ago large employers not uncommonly required that a workman, on obtaining employment, agree not to join a labor union during the period of his service. When the Kansas state legislature forbade this restrictive practice, the Supreme Court declared the law invalid under the Fourteenth Amendment.[15] When Kansas attempted to regulate labor matters by establishing a system of compulsory arbitration with a Court of Industrial Relations similar to that in Australia, the Supreme Court likewise declared this to be a deprivation of liberty and property without due process of law.[16] When Tennessee in 1929 attempted to fix the price of gasoline, the Supreme Court held that this move, too, was invalid under the Fourteenth Amendment.[17] New Jersey was forbidden to fix the fees of employment agencies,[18] New York to fix the charges of theater ticket brokers.[19] Oklahoma was forbidden to limit competition in the ice business.[20] The Fourteenth Amendment guaranteed a rather large measure of laissez-faire in the States.

A fourth grievance arose because the Commerce Clause,[21] a grant of power to Congress not expressed as a restriction on the States, was construed by the Supreme Court to prohibit various State commercial regulations, and to limit the power of the States to tax multi-state economic operations. The Court felt the danger that economic parochialism, the creation of what amounted to disguised state protective tariffs, could tend to break up the nation into a multitude of protectionist units, to the danger of the United States as a whole, and it found in the Commerce Clause a not-implausible basis for declaring ineffectual State regulation and State taxation which tended to unreasonable fragmentation of the national economy. But this had the effect of freeing certain large commercial operations from State legislative jurisdiction – at least until the Congress should give its consent to State action, and this consent was not always forthcoming. Here was another occasion for complaints against the federal judiciary.

The opinions of the Supreme Court were not always unanimous, of course. The detachment with which Holmes viewed the human comedy led him to much more tolerance of legislation than the majority of his brethren. The Fourteenth Amendment, he wrote in a famous dissent, was not intended to enact the Social Statics of Mr. Herbert Spencer.[22] Brandeis came to join him; Stone succeeded McKenna in 1925, and the three saw much alike. But throughout the twenties the majority of the Court continued to find much state and some federal legislation unconstitutional, and to draw on its head the criticisms of liberal men.

IV

With the powers of the nation and states thus circumscribed, the United States entered the depression of 1929. There is neither time nor need to repeat here the story of the next three years. The government attempted some remedies. The Reconstruction Finance Corporation and Home Loan Banks foreshadowed great expansion of federal activity to come. The Norris-LaGuardia anti-injunction act of March 23, 1932, expressed a distrust of the decisions of the federal judiciary in labor matters, and tended to promote union activity at a moment when, unhappily, it could accomplish little. The depression deepened. President Hoover's last days in office were passed while banks were closing all over the country.

The Congress was convened in extraordinary session on March 9, 1933, by President Roosevelt. During the next hundred days it passed a remarkable series of recovery statutes, the origins of the New Deal. The judicial history of this legislation and its successor statutes during the next four years has aptly been called by Professor Corwin, "Constitutional Revolution Limited."

The Supreme Court, during this period of revolutionary reversal of attitude, continued without a change of personnel. From March 14, 1932, when Mr. Justice Cardozo took the seat vacated by Justice Holmes, until June 2, 1937, when Mr. Justice Van Devanter retired, the Court consisted of Chief Justice Hughes and Associate Justices Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts and Cardozo. Overfacile classification of the Justices of the Supreme Court into what are described as liberal and conservative groups is not uniformly

successful. The intellectual predispositions of nine human beings are less easy to sort than a basketful of seashells or a glass case full of stuffed birds; and this insusceptibility to easy classification becomes more apparent as the more complex issues of the forties succeed those of the thirties. In general, however, Chief Justice Hughes and Associate Justices Brandeis, Stone and Cardozo tended to follow the Holmes tradition in recognizing substantially expanded federal powers, and in according to national and state legislatures a considerably greater tolerance under the due-process clauses of the Fifth and Fourteenth Amendments than the majority of the Court had been willing to permit during the decade of the twenties. Justices Van Devanter, McReynolds, Sutherland and Butler by and large continued to take the attitudes which they had taken in the years before the New Deal. Mr. Justice Roberts tended to remain with the conservative group until the spring of 1937.

As constitutional litigation ordinarily takes a rather long time to reach the lower courts, and then to work its way up to the Supreme Court of the United States, a period of two years passed before the first of the New Deal statutes came to grief. Then, however, came a rush of such cases. The years 1935 and 1936 marked the high point of Supreme Court declarations of unconstitutionality of federal measures. On the seventh of January, 1935, the Court in an opinion written by Chief Justice Hughes held unconstitutional two presidential executive orders prohibiting the transportation of petroleum produced in violation of a state law.[23] Six weeks later, passing on the validity of the congressional joint resolution of June 5, 1933, for the payment of United States gold bonds in whatever currency the Congress might make legal tender at the time, the Court held that the bondholder could recover no damages against the United States by reason of devaluation, but only because he could not prove that the paper dollar would buy less than the gold dollar in the United States.[24] The opinion was frank in its statement that the United States had no power to repudiate its promise, and that only the failure of proof of loss prevented the plaintiff from a recovery of damages against the government. On May 6, 1935, the Supreme Court declared unconstitutional the Railroad Retirement Act of 1934.[25] The prevailing opinion of Mr. Justice Roberts found the

statute in conflict with the due process clause of the Fifth Amendment; and also found that it was not actually a regulation of interstate commerce.

However, for the New Deal the blackest day in that spring was May 27, 1935, when the Court handed down three crippling judgments. It held in one case that President Roosevelt had no power to dismiss a federal trade commissioner merely because of policy differences;[26] and in another that a 1934 amendment to the federal Bankruptcy Act impeding the rights of holders of farm mortgages to foreclose was unconstitutional, on the ground that the creditor's interest was thus taken for the benefit of the debtor and that this was a violation of the Fifth Amendment.[27] The hardest blow of the three to the Roosevelt Administration was the decision invalidating the National Industrial Recovery Act.[28] The NRA, administered by that slashing cavalryman, General Hugh Johnson, had formulated codes of fair trade practice, had put the Blue Eagle in shopwindows on every Main Street, had diverted the populace with recovery parades, and had altogether provided a colorful diversion in the long drabness of the depression. When a few elderly justices declared that the whole business had all along been unconstitutional, simply because merchandising was local and not interstate commerce, the letdown was shocking.

On the 31st of May, four days after the decision was handed down, President Roosevelt held a press conference at the White House. Two hundred newspapermen were present, with Mrs. Roosevelt, Senator Robinson, the Democratic leader, and Charles Michaelson, the publicity agent for the Democratic National Committee. The President went over the NIRA opinion in detail. He said that the decision was more important than any other in the lifetime of anyone present. The commerce clause had been written in the Constitution in the horse and buggy days of the eighteenth century when commercial problems were far simpler than those of today and communities were largely self-supporting. Conditions were different now. He said that the issue was whether the country was going to go one way or the other, whether it was going to recognize the right of the federal government to control economic conditions which needed control, or was going to turn back to the state functions of horse and buggy days.[29]

Despite this reverse the President continued the battle for federal power over the national economy. The bituminous coal industry of the country was in a sad state, and federal legislation was pending before the Congress designed to bring some order into soft-coal production, marketing and labor relations. On July 6, 1935, Mr. Roosevelt wrote of this bill to Congressman Hill of the Ways and Means Committee:

> Manifestly, no one is in a position to give assurance that the proposed act will withstand constitutional tests, for the simple fact that you can get not ten but a thousand differing legal opinions on the subject. . . . I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation. . . .[30]

The Congress stilled any qualms it may have had and passed the Act.[31]

The procession of adverse judgments continued. On December 9, 1935, the Court struck down part of the Homeowner's Loan Act of 1933.[32] On January 6, 1936, the Agricultural Adjustment Act of 1933 was declared unconstitutional.[33] In this opinion Mr. Justice Roberts caused some wonderment among constitutional students by writing for the Court:

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty, — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question.

No clause of the Constitution forbids in so many words any of the provisions contained in the statute in question. The Court rested its judgment entirely upon the theory that the combination of a tax on processors and benefits to farmers amounted in the aggregate to a control of the amount of crops produced, and that this was beyond the interstate commerce power. It was difficult for critics to understand Mr. Justice Roberts' plan of parallel-column jurisprudence.

Even this was not the last of the sad procession of cases. The Bituminous Coal Conservation Act, passed at the President's urging, was declared invalid under the federal due process and commerce clauses on May 18, 1936.[34] A week later, on May 25, 1936,

a statute designed to make available a modified form of bankruptcy to insolvent municipalities was adjudged unconstitutional on the ground that the United States was unduly interfering with state matters.[35] And on June 1, 1936, although the Court had two years before upheld price fixing in the milk industry in New York,[36] it now apparently turned about and held that a New York statute fixing minimum wages for women was a violation of the Fourteenth Amendment due process clause.[37]

This parade of decisions, made while the depression was still severe, raised criticism of the Supreme Court to a high point. People came to feel that the Court, or at least part of it, was intellectually and emotionally sclerotic. Drew Pearson and Robert S. Allen in 1936 published a book entitled "The Nine Old Men" criticizing the Court and its decisions. The book was neither temperate, nor scholarly, nor just to such a man as Louis D. Brandeis, but it was exciting, and above all had a catchy title. A comment of the authors on the Bituminous Coal decision was:

> Right may have been on the side of the miners, but might was on the side of the operators. Five reactionary justices bent on legislative murder count for more than three liberals, regardless of how righteous their cause and how irrefutable their logic.[38]

Messrs. Pearson and Allen, however, were not as drastic as a Mr. Louis Goldberg and Miss Eleanore Levenson, who in a book called "Lawless Judges" published in 1935 by the Rand School Press in New York, after a critique of the National Industrial Recovery Act case, wrote (pgs. 241, 242):

> . . . The recall of judges and judicial decisions must be generally established. People must be aroused to the point of using the recall as one means of protecting themselves against judicial tyranny.
>
> Until the recall of judges and judicial decisions shall become effective, we advocate the impeachment of any judge who deliberately misinterprets a statute or law, and that the process of impeachment be made simpler. . . .
>
> We know that it is difficult to strip the ermine from judicial shoulders, but the worshipful attitude of the people towards the courts must be changed through education. . . .

The most effective criticism of the Supreme Court was in the election of 1936. President Roosevelt obtained an overwhelming majority. Three months after this popular vindication, he sent to

the Congress a message[39] proposing legislation which, if enacted, would work an immediate change in the complexion of the Supreme Court, and of the lower federal courts. He mentioned the age of federal judges as a disadvantage in their work and pointed to conflicting constitutional decisions in lower federal courts and the delay in getting the cases to the Supreme Court as hampering the federal government. He said:

> Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs of the facts of an everchanging world.

With the message the President sent a draft of a bill[40] providing that when any federal judge on life tenure reached the age of seventy, had been in office ten years, and within six months had neither resigned nor retired, the President should appoint an additional judge to the same court. Various limiting clauses were written in the draft, including a provision that the members of the Supreme Court should not exceed fifteen.

This proposal produced a surprisingly hostile reaction, both in and out of Congress. Opponents of the measure called it the "court-packing bill," borrowing a term from the trial bar where "jury-packing" is the intentional introduction of prejudiced jurors into the jury-box. Despite its opinions in constitutional cases, the Supreme Court turned out to be widely revered, and the "packing" proposal appeared to debase it. The American Bar Association Journal for 1937 is largely taken up with articles discussing the plan, and, while some authorities supported it (Professor Thurman Arnold of Yale Law School, to mention only one prominent example), the preponderance of opinion was hostile. The President's proposal was never adopted by the Congress.

Much has been written on the effect of the court-packing plan on the justices. The full story of their mental operations can never be known. However, on the 29th of March, 1937, less than two months after the President's message, the Court passed on a minimum wage law of the State of Washington, substantially like the New York statute which had been invalidated under the Fourteenth Amendment due process clause the preceding year.[41]

Mr. Justice Roberts, who had voted against the New York statute ten months before, now joined what has been described as the liberal side of the Court, leaving the four conservative justices – Sutherland, Van Devanter, McReynolds, and Butler – in a dissenting minority. This change of opinion upheld the Washington law, and was prophetic of a greater change. A few days later on April 12, 1937, the National Labor Relations Act was upheld as applied to a steel mill.[42] The division of the justices was the same; Justice Roberts voted to uphold the law. It was apparent that the conception of the federal power under the commerce clause had been drastically revised, and was to be applied thereafter to much that had for many years been considered purely local. And due process no longer was inconsistent with legislative innovation in the economic field. The constitutional revolution had occurred.

V

The year 1936 divides the period since the decision of the Child Labor Case[43] into two roughly equal parts. The Supreme Court, since that significant middle date, has represented in the eyes of American liberal opinion something entirely different from the Supreme Court of the preceding eighteen years. All the justices of the 1932-1936 Court have left the bench. Of the four doctrines of the twenties which gave pain to political and academic critics, three have ceased from troubling. The commerce power is no longer inadequate for any purpose desired by the most enthusiastic Hamiltonian Democrat; the Court has found the Congress acting within its rights in authorizing the Secretary of Agriculture to fix the amount of wheat a farmer can grow for consumption on his own farm;[44] and has upheld a federal statute under which there were fixed the wages of elevator operators in an office building. Interstate commerce is now vertical as well as horizontal. So inclusive have the powers of the National Labor Relations Board proved to be, that that body has been obliged to adopt a set of rules limiting its own undertakings lest its calendars be littered with a mass of business concerning unionization of corner drugstores and the like.[45] The Supreme Court has held no congressional statute invalid as outside the commerce power since 1936.

Nor, with one possible exception, has the due-process clause of

the Fifth Amendment restricted any federal economic legislation since 1936. On December 8, 1952, the Court held fatally vague a section of an act of Congress making it a crime for a factory owner to refuse an official of the Food, Drug and Cosmetic Administration to enter his premises. And the ground of this decision is significant. Justice Douglas in his opinion compares the section under attack to the laws of Caligula, – of whom it is written –

> . . . inasmuch as many offenses were committed through ignorance of the letter of the law, he at last, on the urgent demand of the people, had the law posted up, but in a very narrow place and in excessively small letters, to prevent the making of a copy.[46]

Here it is not easy to say whether the Court is protecting "property rights or human rights." Here, perhaps, the troublesome problem of today's Court is exemplified. It is not easy here to choose the liberal side of the case.

Since the new dispensation of 1937, the Court has declared only two other acts of Congress unconstitutional.[47] One was a statute forbidding payment of salary to Robert Morss Lovett and two other federal employees, who had been the subject of a subversion investigation by a congressional committee. In 1946, in an opinion by Mr. Justice Black, this was held unconstitutional as a bill of attainder forbidden by Article I, Section 9, Clause 3. The other federal statute, upset in 1943, attempted to make it a crime for a man with a criminal record to receive firearms which had been shipped in interstate commerce, and made possession of the arms presumptive evidence of interstate origin. In 1943 the Court, in an opinion by Justice Roberts, held this presumption so violent as to exceed the bounds of due process of law.

During the last sixteen years the Court has been much more severe on State legislation than on acts of the Congress, but it has declared invalid very little economic regulation. As was the case before 1937, the constitutional clause it relies on is that part of the Fourteenth Amendment which forbids any State to deprive any person of life, liberty, or property without due process of law. It has forbidden Illinois to permit religious instruction of children in school buildings during school hours when attendance is compulsory.[48] It has forbidden New York to penalize the publication of accounts of "bloodshed, lust, or crime" on the ground that the

statute is too vague to enforce,[49] and has forbidden the same State to shut down the exhibition of a motion picture film as "sacrilegious."[50] It has struck down restrictions imposed by States on the rights of the Negro to vote,[51] to attend a university[52] and a professional school.[53] It has forbidden a state to convict a defendant of serious crime without the advantage of advice of counsel,[54] to extract from a defendant testimony against his will,[55] and to try a defendant in secret.[56] It has forbidden Illinois to penalize a speech solely because it "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[57] It has forbidden New York to require a license as a condition of preaching in the streets.[58] On November 24, 1952, it forbade New York to enforce a statute purporting to turn over the temporalities of one warring branch of a Russian church to another branch on the ground that it interfered with the free exercise of religion.[59] These cases, one notes, tend to the protection less of "property rights" (if one can make this distinction) than of "human rights."

The "human rights" here protected against the States – freedom of expression, freedom of religion, freedom from unreasonable rigor in criminal justice – are all included in the phrase "life, liberty, or property," and the State is restricted from depriving any person of these rights without "due process of law." A difficulty with this language is its vagueness. It says nothing about Russian churches, street preachers, or magazines full of bloodshed, lust or crime. The Justices have to find these things buried in "life, liberty, or property," and they have to discover that whatever the State did took away these rights without "due process." Some of the Justices are troubled because these same words were used under the *ancien régime* to prevent Tennessee from fixing the price of gasoline, and to invalidate other like State measures.

This ambiguous language of the Fourteenth Amendment has aroused one of the notable differences of theory in the present Court. Mr. Justice Black remembers the bad old days, and sees them threatening still. He wishes for definition in the language of the due-process clause, so that it will, by the same words, protect human freedom but not protect economic selfishness. In 1947 the Court had before it the case of a man named Admiral Dewey Adamson,[60] who was charged with murder in California. In that

State, under certain circumstances, a judge and prosecutor may comment on the failure of a defendant to take the witness stand and explain the evidence against him; and Adamson was convicted after such proceedings. The Court upheld this statute; but in a dissent, Mr. Justice Black protested against what he described as:

> a constitutional theory . . . that this Court is endowed by the Constitution with boundless power under "natural law" periodically to expand and contract constitutional standards, to conform to the Court's conception of what at a particular time constitutes "civilized decency" and "fundamental liberty and justice."

He went on to say that the Fourteenth Amendment had been intended to effect a sort of shorthand incorporation by reference of all the prohibitions against federal action contained in the Bill of Rights – no more and no less – including freedom from the sort of compulsory self-incrimination California used on Adamson. In this way, he thought, all the freedoms of the first eight amendments would be available against the States as well as the federal government, and yet the danger of economic vetoes would be eliminated.

There are two difficulties with this theory of Mr. Justice Black. One is that the historical evidence of the intention he ascribes to those who adopted the Fourteenth Amendment is not entirely clear. The other objection is that the language of much of the Bill of Rights is ill adapted to restrictions on the States; and as the Fifth Amendment itself contains a clause prohibiting deprivations of "life, liberty, or property without due process of law," Mr. Justice Black in getting rid of one ambiguity would incorporate by reference its identical twin.

On the other hand, the alternative is not simple.

On January 2, 1952, Mr. Justice Frankfurter expressed himself forcibly about the Black theory of incorporation by reference.[61] He said, among other things:

> In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. . . . On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content, it exacts a continuing process of application.

When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. . . . The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . . Due process of law thus conceived is not to be derided as a resort to a revival of "natural law." To believe that this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, . . .

Mr. Justice Black views this looseness with alarm. He answers Mr. Justice Frankfurter in a special concurring opinion:

There is, however, no express constitutional language granting judicial power to invalidate *every* state law of *every* kind deemed "unreasonable" or contrary to the Court's notion of civilized decencies; yet the constitutional philosophy used by the majority has, in the past, been used to deny a state the right to fix the price of gasoline, Williams v. Standard Oil Co., 278 U. S. 235; and even the right to prevent bakers from palming off smaller for larger loaves of bread, Jay Burns Baking Co. v. Bryan, 264 U. S. 504. These cases, and others, show the extent to which the evanescent standards of the majority's philosophy have been used to nullify state legislative programs passed to suppress evil economic practices. What paralyzing role this same philosophy will play in the future of economic affairs of this country is impossible to predict.

The Black-Frankfurter difference of theory goes to the heart of the problem facing one who contemplates constitutional government in the United States today. The majority is entitled to have its way. But what if the majority is wrong? By what criterion shall right be determined if not by fifty-one percent of the votes? By the Constitution? What words in it? The Fourteenth Amendment says nothing about Russian cathedrals or magazines of bloodshed, lust or crime. In what narrow place is this Constitution posted up? In what small letters is it written?

VI

The possibility of majority error poses a problem not limited to our own time nor to our own country, nor to constitutional law. For centuries men have tried to devise a form of words which will

so describe error as to make it recognizable. Defined in religious terms, as a violation of the law of nature for which another name is the will of God, it becomes philosophically neat. Says John Locke:

> Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must, as well as their own, and other men's actions be conformable to the law of nature, i.e. to the will of God, of which that is a declaration, and the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it.[62]

This satisfies the need of a pamphleteer who seeks to justify a glorious, and of course successful, revolution better than it does the need of a judge who is asked by a litigant to disregard a statute. Despite the respect which a beneficiary of the Declaration of Independence owes to the Laws of Nature and of Nature's God, he must concede that these have never been codified sufficiently to serve as practical criteria of constitutionality. Can France of the enlightenment offer any more definite guide?

Rousseau, nearly two centuries ago, saw men joining in a social compact to form a nation governed by what he calls the "general will," which by his definition is always right and tends always to the public benefit. Granted only a well-informed citizenry and no communication among citizens (says the displaced Genevese), what small errors might arise in this or that man would cancel themselves out; the result of popular deliberation would then always be good.[63] But the misguided people will persist in talking to one another; and they are incurable joiners. Parties, associations grow up; by and by one group grows so powerful that it carries the day over all the others. The result, unhappily, is no longer the general will.[64] Dwellers in big cities are peculiarly subject to being thus led astray. An adroit crook, a slick talker, can get his way with the people of Paris or London when the Bernese or Genevese, more rustic and therefore less gullible, would run him out of town.[65]

Majorities, that is to say, can err like monarchs. Fifty-one percent of the populace expressing their will through fifty-one percent of the legislators still may not achieve Rousseau's ideal volonté générale – this built-in correctness of mankind-if-it-doesn't-make-mistakes. Such an enviable posture of affairs is, one

gathers, achieved only by a citizenry which, having first renounced life in great cities, then deliberates on public affairs with adequate information but without communications between citizens. Lacking these essential and somewhat infrequent conditions for automatic freedom from majoritarian error, the United States has turned to the Supreme Court and Due Process of Law.

Holmes in 1905[66] tried his hand (and a skilled one it was) at defining the sort of majority mistakes which are so bad as to make a state statute invalid. "I think," he wrote, "that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." Habit, then, has something to do with rightness. The "traditions of our people" must not too intemperately be offended by a transient majority. Rightness has some connotations of national history.

Justice Frankfurter follows his great precursor in stating criteria of that which is rightful. It can be tested, he has said, by "that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization,"[67] and "the notions of justice of English-speaking peoples"[68] (though one justice recently expressed "doubt as to why we should consider only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice").[69] Traditions cannot of course become so fixed as to prevent change. Habit cannot deprive the States of opportunity for reforms in legal process. "Law must be stable and yet it cannot stand still."[70] Whoever has sympathetically followed the struggles of men to describe rightness in a phrase must have become convinced of the impossibility of the task. The jesting Pilate was wise not to stay for an answer. Before he found out what truth was, he would have had a long wait.

Attempts to specify rightness in terms so precise as to decide specific debatable cases are doomed in advance. The effort indicates a misconception of the judge's task, to which habitual forms of speech give currency. We like to speak of ourselves as governed "by laws and not by men," as though somehow the detailed rela-

tions of individual man to collective mankind had been catalogued in print; as though what is required of the good judge is proficiency in the use of an index. This illusion vanishes as soon as one makes an attempt to find the applicable rules of conduct in any considerable number of instances. Most rules, to be sure, as applied to most situations are clear, and are accepted as commonplace. In general, laws against homicide or the intentional destruction of other men's property cause little constitutional debate.[71] But the application of great principles like the desirability of free expression, the accessibility of political change, the opportunity of a man to make protest before the force of government is turned against him, immediately raise questions for which no book can provide an answer. A young man is making a somewhat denunciatory political speech on a city sidewalk; a crowd collects; some threats of violent interference are made among the spectators; the passage of traffic may be interrupted. Can the city police, consistently with the urge for open talk latent in the due process clause of the Fourteenth Amendment, arrest the young man?[72] The concept that one who violates a law forbidding revolutionary exhortation must still go unpunished unless the gravity of the evil discounted by its improbability justifies such invasion of free speech[73] requires for its application a discriminating statesmanship; the answer cannot be looked up in a treatise. When a group of Negroes picketed a store to induce employment of more Negroes by the management, the propriety of a State injunction against the picketers could not be determined by any pat formula expressing predominance of human rights over property rights.[74]

No one really wants an inflexible set of rules to live by. When a demand for certainty is heard, it is apt to be, at base, a demand for some different result in a specific case. And when a rule is so definitely expressed in the laws that its application is unavoidable, one is apt to hear complaints that in some specific instance the rigidity has produced an "unjust" result – a comment which postulates a rule of justice transcending particular legislative formulation.

What really happens is that legislation (in a constitution or in some lesser law) often expresses a rather broad policy, and we expect the judge to carry out that policy in such a way as to achieve what is right in each case. Admittedly this feeling of

"rightness" will derive from the judge's preconceptions, habits, previous experience. The same sort of influences govern the policy decisions of the legislator and the administrator. But we hope that our judges can have a wider mass of governing relevancies than the legislator and the administrator. One of the wisest judges of our time has said that a judge who would pass on constitutional questions should be on bowing terms with philosophers and historians and poets, for supple institutions are not shaped by judges whose outlook is limited by parish or class.

> They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.[75]

And why should not Presidents and Congressmen be required, likewise, to be nicely poised philosophers? One doubts the merit of the prescription. The capacity of the legislator to reflect impatient and perhaps transient popular emotion; the willingness of the executive to damn the torpedoes and go ahead – these are as necessary to make up the compound of government as the thoughtful search for justice.

Is our highest law amorphous, without structure, unascertainable? Must counsel for business corporations, to learn to advise their clients, read historians and philosophers and poets? By and large the answer is that if the question at issue is important, catholicity of learning is apt to be useful. In the most significant constitutional controversy in which great corporations have been involved since 1937 – the Steel Seizure Case of June, 1952[76] – the opinions of the justices cited the Federalist Papers, the autobiography of Theodore Roosevelt, a biography of President Taft, the Works of Alexander Hamilton, correspondence of Abraham Lincoln, Woodrow Wilson's "Constitutional Government," Churchill's "The Unrelenting Struggle," Rossiter's "Constitutional Dictatorship," Holdworthy's "History of English Law," correspondence and a Message to Congress of President Jefferson, correspondence of President Madison, correspondence of John Jay, and the *Economist* of May 10, 1952, which observed:

> At the first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The

blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start.

Despite these literary and historical riches, constitutional law is not without structure. While undeviating adherence to precedent is not observed and probably is undesirable in view of changes of circumstances with the passage of time, still within the wide boundaries of such general policies of governmental fairness as the Due Process Clauses, patterns of decision form and become reasonably stable so that some measure of predictability is achieved, except in those marginal questions which will always be present when any division line is drawn. Mr. Justice Stone set one such pattern in 1938 when he suggested that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."[77] State statutes infringing freedom of expression, then, are declared unconstitutional more readily than state economic laws; the history of the Court's decisions since 1937 supports this grouping. And if within Stone's class individual cases are sometimes decided for one side and sometimes for the other, this indicates no judicial challenge to the principle of free expression; it only shows that in the infinite mutability of human affairs, judicial decisions on what are actually complicated questions of fact[78] will sometimes bring a case within the principle and sometimes not. Outcry at a given decision on constitutionality may be in words directed against an asserted abandonment of principle, or against the power itself of courts to declare statutes unconstitutional. Actually the outcry is apt to represent only a feeling that in this instance the Court had mistakenly decided a complex matter of fact.

Despite the indefiniteness of the criteria of unconstitutionality, judicial inaction is not today a slogan for liberals. In these times it sometimes seems less certain than it was before 1937 that mankind, left to itself, will achieve desirable laws. We are told that adroit rascals, insinuating haranguers, such as Rousseau saw swaying the people of London or Paris, are abroad in the land cozening the majority into the legislation of evil. Self-restraint by the

Court has ceased to be an unqualified virtue. It is desirable only when the laws are good. When the Legislature is wrong, judicial inaction is deplorable. King Log is out of favor on the campus.

In the magazine *Look* for July 31, 1951, Professor Rodell of the Yale Law School, writing under the title of "Our Not So Supreme Court," complains of the refusal of that body to take jurisdiction of more cases. He even finds kind words for the pre-1937 Court.

> The Court of Nine Old Men, for all its conservatism, [he writes] had the courage and integrity to take on the tough cases and meet squarely the important issues that elicited Holmes' and Brandeis' famous dissenting opinions.

Professor Eugene Rostow of Yale, in a scholarly paper in the December, 1952, *Harvard Law Review*, strikes a note that would have sounded discordant to the editorialists of the *New Republic* of 1924. He says:

> The idea that judicial review is undemocratic is not an academic issue of political philosophy. Like most abstractions, it has far-reaching practical consequences. I suspect that for some judges it is the mainspring of decision, inducing them in many cases to uphold legislative and executive action which would otherwise have been condemned. Particularly in the multiple opinions of recent years, the Supreme Court's self-searching often boils down to a debate within the bosoms of the Justices over the appropriateness of judicial review itself.
>
> The attack on judicial review as undemocratic rests on the premise that the Constitution should be allowed to grow without a judicial check. The proponents of this view would have the Constitution mean what the President, the Congress, and the state legislatures say it means. In this way, they contend, the electoral process would determine the course of the constitutional development, as it does in countries with plenipotentiary parliaments.
>
> But the Constitution of the United States does not establish a parliamentary government, and attempts to interpret American government in a parliamentary perspective break down in confusion or absurdity. . . .

Two great types of questions are continually coming before the Court – entertained there, so far as can readily be seen, by the will of the nation. One of these involves the decision whether a given activity transcends the allotted functions of the States in a federal structure – whether, for example, the State is unduly taxing national commerce. Another type concerns controversies over the adjustment of relations between the individual and his State,

under guarantees by the United States that no State shall treat its people too badly; and controversies between the individual and that great, remote, and somewhat slow-moving entity, the United States itself. In December, 1952, there was left to the Court to decide as important a question of adjustment of power between nation and State, and of the fundamental decency of the State toward a large body of its citizens, as has arisen in living memory – the question whether it is consistent with the right of everyone to liberty and equal treatment from the State that in public schools some children be secluded from others because of the color of their skins. There is nothing in the words of the Fourteenth Amendment to tell the Supreme Court how to decide this question. Only ideas of fairness will guide it in the last analysis. And if, to some of us, the answer to this question on grounds of fairness seems reasonably clear, the clarity disappears in other issues which every year are submitted to the federal judiciary.

As this paper is written, there are pending before the Supreme Court for argument or decision cases concerning the standing of aliens who claim a right to stay in the United States; cases involving the rights of the accused in criminal trials in state courts; cases involving rights of employees under the National Labor Relations Act; a case involving primary voting by Negroes in Florida. There is a case in which the Court must decide complex questions as to which of the several States is the proper one to decide matters of family law such as divorce or custody of children when the family is scattered and moving about. There is a dispute over the control of electric power generated in one State but utilized in several. There is a dispute over the propriety of railroad freight rates fixed by the Interstate Commerce Commission. Before the Court, week by week, comes an endless variety of controversies arising from our overwhelming growth of population and our complicated national structure. It is conceivable that we might have a nation without the federal judiciary. But we should have to have the same functions performed by another organ, and probably it would resemble what we now have. If the Court did not exist, we should have to create one. Some sort of Supreme Court is going to be continued as long as the people of the nation have creeping doubts of the proposition that the majority view is right all of the time. Our Court is the symbol of our people's self-restraint.

NOTES

[1] "Du Contrat Social," Book II, Chapter 3.

[2] Holmes, "Natural Law," Collected Legal Papers, 310.

[3] Cf Guido de Ruggiero, "Liberalism," V Encyclopedia of Social Sciences, 435, 440.

[4] Speech before the American Federation of Labor at Cincinnati, June 21, 1922, reprinted in Congressional Record Vol. 62, p. 9077.

[5] Colegrove v. Green, 328 U. S. 549 (1946).

[6] South v. Peters, 339 U. S. 276 (1950).

[7] *New York Times*, April 12, 1924, page 1.

[8] Mr. Albert Mavrinac, now of the Department of Government at Wellesley, is the author of a brilliant study, soon to be published, of the shift of editorial policy in the United States during the last generation. I am indebted to him for the references to the President's message and the *New Republic* editorial.

[9] U. S. Constitution, Art. I, Sec. 8, Cl. 3, "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . ."

[10] Hammer v. Dagenhart, 247 U. S. 251 (1918).

[11] Bailey v. Drexel Furniture Co., 259 U. S. 20 (1922).

[12] "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

[13] Adair v. U. S., 208 U. S. 161 (1908).

[14] Adkins v. Children's Hospital, 261 U. S. 525 (1923).

[15] Coppage v. Kansas, 236 U. S. 1 (1915).

[16] Wolff Pkg. Co. v. Court of Industrial Relations, 262 U. S. 522 (1923).

[17] Williams v. Standard Oil, 278 U. S. 235 (1929).

[18] Ribnik v. McBride, 277 U. S. 350 (1928).

[19] Tyson v. Banton, 273 U. S. 418 (1927).

[20] New State Ice Co. v. Liebmann, 285 U. S. 262 (1932).

[21] See footnote 9 above.

[22] Lochner v. New York, 198 U. S. 45, 75 (1905).

[23] Panama Refining Co. v. Ryan, 293 U. S. 388 (1935).

[24] Perry v. U. S., 294 U. S. 330 (1935).

[25] Railroad Retirement Board v. Alton Railroad Co., 295 U. S. 330 (1935).

[26] Humphrey's Executor v. U. S., 295 U. S. 602 (1935).

[27] Louisville Bank v. Radford, 295 U. S. 555 (1935).

[28] Schechter Corp. v. U. S., 295 U. S. 495 (1935).

[29] *New York Times,* June 1, 1935, p. 1, col. 8.

[30] Published Papers of F. D. R., Vol. IV, pp. 297, 298.

[31] Bituminous Coal Conservation Act of 1935, August 30, 1935, 49 Statutes at Large 991.

[32] Hopkins Fed. Ass'n v. Cleary, 296 U. S. 315 (1935).

[33] U. S. v. Butler, 297 U. S. 1, 62 (1936).

[34] Carter v. Carter Coal Co., 298 U. S. 238 (1936).

[35] Ashton v. Cameron County Water Imp. Dist., 298 U. S. 513 (1936).

[36] Nebbia v. New York, 291 U. S. 502 (1934).

[37] Morehead v. Tipaldo, 298 U. S. 587 (1936).

[38] "Nine Old Men," Ch. XVI, p. 313.

[39] Cong. Record, Feb. 5, 1937, Vol. 81, p. 877.

[40] Ibid., p. 880; U. S. Law Week Supp. 9 Feb. 1937.

[41] West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).

[42] NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937).

[43] Hammer v. Dagenhart, 247 U. S. 251 (1918).

[44] Wickard v. Filburn, 317 U. S. 111 (1942).

[45] 16 Annual Report of NLRB for the fiscal year ending June, 1951, pp. 15 & 16.

[46] Suetonius, "Lives of the Caesars," Book IV, Chap. 41, p. 469 (Loeb edition).

[47] There have been several additional cases in which federal statutes were narrowly construed to avoid unconstitutionality. Such construction cases approach constitutional rulings.

[48] McCullom v. Board of Education, 333 U. S. 203 (1948).

[49] Winters v. New York, 333 U. S. 507 (1948).

[50] Burstyn v. Wilson, 343 U. S. 495 (1952).

[51] Smith v. Allwright, 321 U. S. 649 (1944).

[52] McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950).

[53] Sweatt v. Painter, 339 U. S. 629 (1950).

[54] Gibbs v. Burke, 337 U. S. 773 (1949).

[55] Rochin v. California, 342 U. S. 165 (1952).

[56] Re Oliver, 333 U. S. 257 (1948).

[57] Terminiello v. Chicago, 337 U. S. 1 (1949).

[58] Kunz v. New York, 340 U. S. 290 (1951).

[59] Kedroff v. St. Nicholas Cathedral, 344 U. S. 94 (1952).

[60] Adamson v. California, 332 U. S. 46 (1947).

[61] Rochin v. People of California, 342 U. S. 165, 169 (1952).

[62] Second Treatise of Civil Government, Ch. XI, 135 (1689).

[63] Contrat Social, Book 2, Ch. 3, "Si, quand le peuple suffisamment informé délibère, les Citoyens n'avoient aucune communication entre eux, du grand nombre de petites différences résulteroit toujours la volonté générale, et la déliberation seroit toujours bonne."

[64] Book 2, Ch. 3, "Si la Volonté Générale Peut Errer." Madison in the Federalist No. 10 repeats this idea in terms suggestive of Rousseau's.

[65] Book IV, Ch. 1.

[66] Dissenting in Lochner v. New York, 198 U. S. 45, 76 (1905).

[67] Frankfurter, J., in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 162 (1951).

[68] Frankfurter, J., in Malinski v. New York, 324 U. S. 401, 417 (1945).

[69] Black, J., concurring in Rochin v. California, 342 U. S. 165, 176 (1952).

[70] Pound, "Interpretations of Legal History," page 1.

[71] The merits of a claim of governmental responsibility under the Fifth Amendment for the army's destruction of property in the Philippines to keep it from enemy hands caused the Supreme Court worry in December, 1952. U. S. v. Caltex, 344 U. S. 149 (1952).

[72] In Feiner v. N. Y., 340 U. S. 315 (1951), the Supreme Court decided against such a speaker.

[73] Learned Hand, J., in Dennis v. U. S., 183 F 2d 201, at p. 212, adopted in the opinion of Vinson, C. J., 341 U. S. 494, 510 (1951).

[74] Hughes v. Superior Court, 339 U. S. 460 (1950).

[75] Learned Hand, "Sources of Tolerance," 79 U. of Pa. L. Rev. 1, 12 (1930).

[76] Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 594 (1952).

[77] See his celebrated Footnote 4, in U. S. v. Carolene Products, 304 U. S. 144, 152 (1938).

[78] See the expression of this idea in Brandeis' dissent in Burnet v. Coronado Oil and Gas Company, 285 U. S. 393, 410 (1932).